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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARTHUR CALDERON, Warden of
San Quentin Prison and
DANIEL E. LUNGREN,
Attorney General

Petitioners,

v.

MELVIN MEFFERY WADE,

Respondent.

PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF REVERSAL BY THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (WILLIAM C. CANBY, JR., STEPHEN REINHART, AND STEPHEN S. TROTT, CIRCUIT JUDGES)

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QUESTIONS PRESENTED

1. Does a torture-murder special circumstance instruction's silence on intent to torture violate the Eighth Amendment by failing to narrow the class of murderers eligible for death?

2. Is Boyde limited to instructions ambiguous on their face?

3. Does proper application of Boyde dictate that when a jury is instructed on intent in a torture-murder instruction, the jury is deemed to understand the intent also applied to the special circumstance torture-murder instruction?

4. After the California Supreme Court and the district court judge found defense counsel competent, did the majority's finding of incompetent counsel at the penalty phase rest on hindsight analysis in violation of the cautions in Strickland-Fretwell?

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit reversing the special circumstance and the judgment of death in this case.

OPINIONS BELOW

On May 16, 1994, the Ninth Circuit in a 2-1 decision (Justice Trott dissenting) issued an opinion reversing the special circumstance and the death penalty of Melvin Meffery Wade on the basis that the torture-murder special circumstance instruction failed to meet requirements of the Eighth Amendment and Respondent received ineffective assistance of counsel at the penalty phase of his trial. Wade v. Calderon, 29 F.3d 1312 (9th Cir. 1994), Appendix A.

JURISDICTION

This Court has jurisdiction under sections 1651, subdivision (a), and 2254 of Title 28 of the United States Code and Rule 20.1 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The United States Constitution, Amendments Six, Eight and Fourteen.

STATEMENT OF THE CASE

On May 21, 1982, Melvin Wade was sentenced to death for the torture-murder of his 10-year-old step-daughter. His conviction and sentence were affirmed on direct appeal. People v. Wade 44 Cal. 3d 366, 750 P.2d 794, 244 Cal. Rptr. 905 (1988); cert. den. Wade v. California, 488 U.S. 100 (1988).

On January 12, 1989, a stay of execution was issued by the federal district court and a Petition for Writ of Habeas Corpus was filed. After an evidentiary hearing on claims of ineffective assistance of counsel and jury misconduct, the district court denied the writ of habeas corpus on September 14, 1990. Wade v. Vasquez, 752 F.Supp. 9, 31 (C.D. Cal. 1990), Appendix B.

On remand from the Ninth Circuit, the district court held a second evidentiary hearing and found that neither

Attorney Helft nor the public defender had any conflict of interest.

Wade appealed the denial of his petition for writ of habeas corpus challenging his 1982 state court conviction. On May 16, 1994, his special circumstance and death penalty were reversed by the Ninth Circuit. On September 22, 1994, the State's petition for rehearing and suggestion for hearing en banc were denied. Appendix C.

STATEMENT OF FACTS

Guilt Phase Evidence

On the morning of April 10, 1981, Wade lived in a motel in San Bernardino California with his wife, Irabell "Cookie" Strong and four of her five children. Wade accused his 10 year-old stepdaughter, Joyce, of smelling and not washing herself properly. He began beating the child with his fists and then with a wooden board from the frame of the couch. Wade wore socks over his hands to prevent bruises from showing. (RT 2854, 2861, 2865, 2871, 2878.)

Wade continued beating Joyce with his fists throughout the evening. He had Joyce remove her shirt and stand against the wall with her arms extended while he beat her across the chest and stomach with the board from the couch. Throughout the beatings Joyce cried and asked Wade to stop, telling him she was

sorry and that she would be good. Wade told Joyce that he did not want to hear it and to shut up. RT 2878.

Later in the day Wade ordered Joyce inside a military duffel bag. After clipping the bag shut with Joyce inside, Wade hoisted the bag into a crawl space in the ceiling above the bedroom. Three or four hours later, Joyce freed herself from inside the duffel bag and asked Wade if she could come down. Wade fell while reaching for Joyce, accused her of causing him to fall and grabbed her as she dangled from the crawl space. RT 2859-2865.

Wade punched Joyce and threw the child into the wall with such force that her head penetrated the wall. Joyce's mother began to scream. The manager of the motel heard adult voices arguing and children crying and knocked on the door. A male voice said it was a family dispute and they would quiet down. As the manager

was leaving, he saw a woman come out of the room pursued by a man who then hit her. After the couple went back inside the room, the manager telephoned the police. RT 2817-2827, 2865.

At some point in the evening, Wade wrapped a dog leash around Joyce's neck and attempted to hang her on the wall from a nail. When that failed, he dropped her to the floor, kicked her, then picked her up and dropped her on the floor again. Wade then began stomping on her stomach. RT 2880-2883.

The police responded to the motel at 3:35 a.m., on April 11th, approximately 20 minutes after the motel manager had telephoned. Wade told the police they were having a family dispute. The police left 15 minutes after they arrived when Joyce's mother said that everything would be all right and Wade would be leaving. RT 2794-2800.

After the police left, the motel manager saw Joyce's mother running and yelling with Wade chasing her. Wade caught up with his wife and struck her in the face. As the motel manager approached them, Wade ran away. Joyce's mother asked the motel manager to telephone the police as one of her children was badly injured. The manager telephoned the paramedics and police. RT 2833-2839.

The paramedics found Joyce dead on the floor of the bedroom. RT 2905. Joyce was wearing only a pair of panties and had bruises on her chin and the left side of her face. RT 2802. She died from cranial, cerebral, abdominal and soft tissue injuries. Any one of the major injuries to the child's head, abdomen or neck could have caused her death. RT 3284. The pathologist who performed the autopsy on Joyce opined that her injuries were very painful and that it must have

taken hours for her to die. RT 3284, 3294.

Moments after police arrived at the motel, Wade returned and walked through the parking lot with his hands up in the air saying, "Here I am. I'm the one you want. I guess I hit her too hard." He was arrested. RT 2803.

After his arrest and admonition regarding his rights, Wade admitted striking Joyce with his fists, a paddle, hitting her head into the wall, and placing her up in the crawl space in the ceiling. RT 4436, 4468.

Wade's defense was not guilty by reason of insanity.[1/] He claimed multiple personalities or possession syndrome, an "atypical dissociate disorder" which

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1. By stipulation, the issue of defendant's sanity was submitted to the jury on the evidence introduced during the guilt phase of the trial. The jury found that Wade was sane at the time of the commission of the offense.

occurs when a person believes he is invaded by spirits from an outside source. RT 6047.

Specifically, Wade claimed to be occupied by "Othello Mulet Metheen" a foul-mouthed, street-wise man who "fed off torture" and disliked Wade intensely.[2/] RT

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2. "Joe" (RT 3707) and "Michael" (RT 5894) were also alternate personalities of Wade. Two psychiatrists who interviewed him spoke to more than one personality and opined that he was a multiple personality and therefore not sane. RT 3627, 3956, 3959. A third psychiatrist interviewed Wade and spoke with several personalities but did not formulate a definitive opinion. RT 4099. A fourth and fifth psychiatrist examined Wade and were convinced that he was not a multiple personality. RT 4589, 4660. A sixth psychiatrist opined that Wade was not a multiple personality, rather he was schizotypal and anti-social and legally sane. RT 4842-4843, 4933.

The only evidence of "Othello" was the testimony of the psychiatrists and the fact that on one occasion Wade had told Joyce's mother that his name was Othello Mulet Metheen. RT 2899. He had once told Carol Amos, the mother of his twin sons, that his army buddies called him Othello. RT 5216, 5249. Ella Edwards, a woman whose family Wade lived with as a teenager, stated that he

3609, 3611-3612. "Othello" killed Joyce. RT 5898, 3569.

Experts testified Wade had been sexually and physically abused and locked in a closet for long periods of time as a child and had attempted suicide as a young adult. RT 3562, 3568, 5890. A four-hour videotaped interview of Wade by a psychiatrist and his attorney was played for the jury. RT 5498-5719. In the videotape Wade spoke about memory lapses, finding himself places and not knowing how he got there, his suicide attempts, "Othello," and his relationship with the victim and her family. He specifically spoke about hearing voices from the age of six (RT 5552) after being locked in dark closets for long periods at a time and being abused by his mother's boyfriend,

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once told her his full name was Othello Mulet Metheen. RT 5280. People who worked with Wade had never heard of Othello, Joe, or Michael. RT 4764.

Jack. Jack was also sexually abusing Wade's sister. RT 5553-5565.

Wade claimed to have no memory of the crimes. RT 3578.

Penalty Phase Evidence

Wade, the only witness to testify at the penalty phase, testified that he loved both Joyce and her mother, was unaware of the events of April 10-11, and expressed sadness over the child's death. RT 6303.

Wade reaffirmed his videotaped statements that he had been sexually and physically abused and locked in a closet as a child (see RT 3558, 5556) by saying what he told the doctors about his childhood sexual and physical abuse was true. RT 6307.

At the request of defense counsel, "Othello" emerged on the witness stand and testified before the jury. "Othello's" testimony, marked by the use

of profane language, said Wade was his enemy and that Othello felt no sorrow for Joyce's death. "Othello" claimed to be the devil's disciple and said that he wanted to kill Wade. RT 6331.

The Federal Evidentiary Hearing: Competence of Counsel

On December 29, 1981, Attorney F. Donald Ames was appointed to represent Wade at trial. 3 EH 32. Ames had worked as a public defender for six years and three years as a private practitioner specializing in criminal defense. 3 EH 21-24. He was among the top ten criminal defense attorneys in the county, and one of five qualified to try death penalty cases. 4 EH 114. He replaced Daniel Greenberg, who told Ames ". . . the case was an absolute loser, and the facts were heinous, and . . . he couldn't imagine any jury that wouldn't convict him." 3 EH 35.

Psychiatrist Ethel Chapman and psychologist Stephen Lawrence had already

examined Wade. Additionally, Ames had psychologist Craig Rath and Neurologist Guy Hunt examine the accused, due to his prior history of mental instability, for possible defenses of insanity or diminished capacity. 3 EH 45.

The case "was not [a] `who dun it'" and Ames did not necessarily expect to prevail at the guilt phase but felt that ". . . the thrust of the defense [should be aimed at] penalty . . ." 3 EH 39. After the jury was selected, Ames came into new information that made him believe Wade was suffering from dissociative disorder and that he might have an insanity defense. 3 EH 54-56. He hired multiple personality expert Dr. Ralph Allison. 3 EHG 58.

Ames asked for a mistrial saying he did not have a chance to voir dire on not guilty by reason of insanity and dissociative disorder. 3 EH 55, 60; RT

3340 et seq. Instead, the judge gave him a two-week continuance. At that point, Ames felt he could not abandon his client so he ". . . worked day and night, all -- almost to midnight, one o'clock, two o'clock in the morning in that two week period. . . ." 3 EH 121-122. He also decided to put the psychiatric defense into the guilt phase because he wanted the jury to know as early as possible that they were dealing with a very sick human being. He did not want to save the psychiatric defenses for mitigation at a later phase of the trial after the jury had cemented its views. 3 EH 125-126. Ames decided to use the abuse and dissociative disorder to show that the jury should spare Wade's life, and he felt the child abuse Wade had suffered was embraced in the multiple personality defense since it gave rise to the multiple personality. 3 EH 138.

The district court found counsel provided constitutionally effective representation (Wade v. Vasquez, 752 F.Supp. at 932-935) and denied the writ of habeas corpus.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the two judge majority of the Ninth Circuit panel has reversed a special circumstance finding by assuming a jury instruction's silence on intent to torture violated the Eighth Amendment. This is an important question of federal law that should be settled by this Court. Rule 10(c).

The majority in this case also limited the Boyde "reasonable likelihood" test to jury instructions ambiguous on their face. This limitation conflicts with the California Supreme Court's interpretation of Boyde and appears to conflict with four other United States Courts of Appeal which apply Boyde to erroneous instructions. Rule 10(a), (b); United States v. West, 28 F.3d 748, 750-752 (8th Cir. 1994); United States v. Merlos, 984 F.2d 1239, 1241-1242 (D.C.Cir.

1993); Rock v. Zimmerman, 959 F.2d 1237, 1247-1248 (3rd Cir. 1992); Williams v. Chrans, 945 F.2d 926, 937-938 (7th Cir. 1991). See also, "vagueness challenges"; Taylor v. Gilmore, 954 F.2d 441-452, 453 (7th Cir. 1992) "Boyde simply directs a reviewing court to access whether, in its opinion, there is a reasonable likelihood that a certain event occurred"; Parks v. Saffle, 925 F.2d 366, fn. 5 at 369 (10th Cir. 1991), testing when argument of counsel combined with anti-sympathy instruction may preclude juries from considering relevant mitigating evidence.

Furthermore, despite the latent ambiguity in the torture special circumstance instruction which omitted the intent element, that ambiguity became patent when compared with the torture-murder instruction given at the same time. As such, Boyde should apply.

The Ninth Circuit majority's illusionary "distinguishing" of Boyde in reviewing claims of instructional error in the guilt phase of a capital case has broad implications. There are approximately 624 condemned inmates in state prisons in seven states having a death penalty within the jurisdiction of the Ninth Circuit Court of Appeals. Accordingly, the Ninth Circuit's unique interpretation of Boyde for the purpose of reversing capital judgments threatens a basic and fundamental denial of due process of law to all states within the jurisdiction of the Ninth Circuit. The district courts will be bound by the two judge majority opinion in this case. See United States v. Bagley, 659 F.Supp. 223, 227 (W.D. Wash. 1987) citing Boys Marketing v. Retail Clerks Union, 398 U.S 235, 24-241 (1970); Barreto v. United States, 694 F.2d 603, 607 (9th Cir. 1982).

The majority also found trial counsel incompetent using a hindsight analysis in violation of the cautions of Strickland-Fretwell after the opposite result was reached by the California Supreme Court and the district court judge, who conducted an evidentiary hearing on competence of counsel.

This was an overwhelming case with eyewitnesses to the 22 hour torture beating of the 10-year-old victim and no defenses were discovered by mental health experts who examined Wade before trial. Consequently, this case illustrates that two Ninth Circuit judges can reverse any capital case, through this type of second guessing of the trial attorney and the contrary conclusion of the prior reviewing courts.

For these reasons as well as those stated in the dissent of Judge Trott, (Wade v. Calderon, 29 F.3d at 1336-

1349) Petitioners respectfully urge this Court to grant the petition for writ of certiorari in this matter.

ARGUMENT

I

THE TORTURE-MURDER SPECIAL CIRCUMSTANCE INSTRUCTION CONSTITUTIONALLY NARROWS THE DEATH-ELIGIBLE BECAUSE (1) THE ORDINARY USAGE OF THE TERM "TORTURE" EMBODIES AN INTENT TO INFLICT PAIN AND (2) THE JURY FOUND AN INTENTIONAL KILLING AND INFLICTION OF SEVERE PAIN

The two judge decision examined Wade's torture-murder special circumstance instruction in isolation and concluded that because it failed to require intent to inflict pain, it does not narrow the class of death eligible defendants as required by the Eighth Amendment.[3/] The

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3. The Eighth Amendment to the United States Constitution imposes two requirements on the states in the imposition of capital punishment. First, the death penalty statute must rationally narrow the class of defendants upon whom the death penalty may be imposed. Once the narrowing function has taken place, the Eighth

ordinary meaning of the word torture implies intent to inflict pain. Furthermore, the jury was told it must find both an intent to kill and infliction of severe pain, beyond a reasonable doubt, to find the special circumstance true.[4/]

Amendment also requires that the defendant be allowed to place before the sentencing fact-finder any evidence related to the offense or the offender that may justify a lesser sentence than death. Romano v. Oklahoma, 512 U.S. ___, 129 L. Ed. 2d 1, 9-10, 114 S. Ct. 2004 (1994).

Apart from these two requirements, the Eighth Amendment does not impose any substantive requirements on the states and the class of death-eligible defendants may include those who kill, who attempt to kill, who intend to kill, intend to use lethal force, or who demonstrate reckless indifference to life and play a major role in a felony murder. Cabana v. Bullock, 474 U.S. 376 (1986); Tison v. Arizona, 481 U.S. 137 (1987). Beyond these requirements, the States are entitled to the traditional latitude they enjoy to define their own substantive criminal laws, procedures, and punishments. Romano, 129 L. Ed. 2d at 10.

4. As to the torture special circumstance the jury was instructed:

Thus, the special circumstance rationally narrowed the death eligible category.

This Court has never held that a torture-murder instruction that is silent on the element of intent violates the Eighth Amendment of the Constitution by

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> "To find that the special circumstance, referred to in these instructions as murder involving infliction of torture, is true, each of the following facts must be proved:
>
> "1. That the murder was intentional, and
>
> "2. That the murder involved the infliction of torture.
>
> "To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration.
>
> "Awareness of pain by the deceased is not a necessary element of torture." RT 6107.

The jury also found the "heinous, atrocious or cruel" second special circumstance (Cal. Pen. Code, § 190.2, subd. (a)(14)), however, it has been held unconstitutionally vague so only the torture special circumstance (Cal. Pen. Code, § 190.2, subd. (a)(18)) remains. Wade v. Calderon, 29 F.3d 1312, 1322 (9th Cir. 1994).

failing to rationally narrow the class of defendants upon whom the death penalty may be imposed. The issue presented by the torture-murder special circumstance instruction in this case is whether the torture-murder special circumstance instruction objectively narrowed the class of death eligible defendants.

Reasoning that most murders presumably involve severe pain, absent instantaneous death of the victim, the majority concluded that the torture-murder special circumstance violated the Eighth Amendment by not requiring the jury to find an intent to torture. Cal. Pen. Code, § 190.2, subd. (a)(18); Wade v. Calderon, 29 F.3d 1312, 1319-1320 (9th Cir. 1994). That finding ignores the "ordinary usage" of the term torture.

In Arave v. Creech, ____ U.S.___, 123 L. Ed. 2d 188, 198, 113 S. Ct. 1534 (1993), this Court reaffirmed the

two-part Eighth Amendment standard for determining whether a capital sentencing scheme suitably directs a sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious sentencing decisions. The statutory scheme must first limit the sentencer's discretion by clear and objective standards that provide the sentencing body "'some guidance.'" Ibid, emphasis original; Arizona v. Walton, 497 U.S. 639 (1990). This scheme must also narrow the class of death eligible defendants in a meaningful way.

Creech based a death sentence in part on Idaho's statute for murder exhibiting "utter disregard for human life." The limiting instruction indicated this meant acts or circumstances "surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, i.e., the cold-blooded, pitiless slayer." Creech, 113 S. Ct. at

1539. This Court held that that construction satisfied constitutional requirements. Id., at 1541. See also Turner v. Williams, 93-4001 (filed 9/15/94), 1994 US App. LEXIS 25608 upholding Virginia's "vileness" factor.

When considering the first requirement, this Court found that the Idaho Statutory Aggravating Circumstance[5] of a "cold-blooded" or "pitiless" killer provided a clear and objective standard for providing sentencers under Idaho's capital sentencing scheme some guidance under the

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5. The equivalent of Idaho's "Aggravating Circumstances" are California's "Special Circumstance" categories found in California Penal Code section 190.2, because both serve the same function of rationally narrowing the class of death-eligible defendants. Under the California statutory scheme, an "aggravating circumstance" refers to sentencing factors in California Penal Code section 190.3 that are found to exist by a jury in making its actual sentencing choice between a death verdict and a life without possibility of parole verdict.

Eighth Amendment. In rejecting the argument that the phrase "cold-blooded, pitiless slayer" was "without content," this Court relied on Webster's Dictionary definition of both "cold-blooded" and "pitiless." Arave v. Creech, 123 L. Ed. 2d at 198-199. Based on such "ordinary usage," this Court found that those two terms referred to one who "kills without feeling or sympathy." Id., at 199. Torture with indifference to pain appears to be sufficient for federal constitutional law.

Under Creech, Petitioners respectfully submit that the "ordinary usage" of the term "torture" governs the analysis in this case and such ordinary usage necessarily embodies an intent to inflict extreme pain. The dictionary definition of torture describes it as "the infliction of intense pain . . . to punish

or coerce someone: torment or agony induced to penalize . . . , to extort . . . , or to give sadistic pleasure to the torturer." Webster's Third New International Dictionary, (1976) at 2414. Under this definition, the torture instruction limited the jury's discretion and the jury received adequate instruction on the need to find intent to inflict extreme pain.

The Eighth Amendment's additional requirement of objectively narrowing the class of death eligible defendants, turns on whether "a sentencing judge reasonably could find that not all . . . [California] capital defendants" intend to inflict extreme pain and, in fact, actually inflict extreme pain upon their murder victims. Arave v. Creech, 123 L. Ed. 2d at 201. If the statutory scheme "has identified . . . [a] subclass of defendants . . . as more deserving of

death" and "some within the broad class of first-degree murderers" fall outside that subclass, the statutory scheme "has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed." Ibid. There is no doubt that a torture murder subclass separates itself from the class of first degree murderers in a meaningful way. Not all murderers torture their victims, in fact, few do.

Torture is a common concept. Under the ordinary meaning of the word, for example, it is not reasonably conceivable that a jury of 12 would agree beyond a reasonable doubt that simply shooting a person who did not in fact die for several hours and who therefore experienced prolonged pain, amounted to torture-murder. Jurors of ordinary sensibility would not find that all murders involve torture. Clearly

something extra must be present. Wade's conduct had to constitute torture before the special circumstance could be found true. Therefore, the ordinary usage of the term torture is sufficient to supply a meaningful narrowing of the class of death-eligible defendants.

This Court has used the word torture, without definition, to illustrate great culpability. In considering what type of culpability and intent should be prerequisite to the death penalty, this Court observed ". . . some unintentional murders may be among the most dangerous and inhumane of all -- the person who tortures another not caring whether the victim lives or dies . . ." Tison, 481 U.S. at 137, 157, emphasis added; see also, Maynard v. Cartwright, 486 U.S. 356, 365 (1985).

In any event, even if common usage of the word torture did not embody

the intent to inflict pain, there would still be no Eighth Amendment deficiency here because the statute and instructions objectively narrowed the class of death eligible defendants in that each required an intentional killing and the infliction of extreme pain.

The narrowing must avoid "pejorative adjectives" that merely "describe a crime as a whole" Creech, 123 L. Ed. 2d at 199, and instead focus on "a fact to be inferred from the surrounding circumstances." Id., emphasis in original. The torture special circumstance in this case meets this requirement. The intent to kill was embodied in the instruction and expressly argued by the prosecutor. In addition, the infliction of extreme pain is likewise "a fact to be inferred from the surrounding circumstances." Wade's affirmative acts upon the victim clearly

established the infliction of extreme pain. Wade beat his 10-year-old step-daughter with his fists and a wooden board from the frame of a broken couch. He continued beating her throughout the evening, ordered her inside a military duffel bag which he clipped shut and hoisted into a crawl-space in the ceiling of the bedroom. Three or four hours later, Joyce asked if she could come down, and respondent punched her and threw her into the wall with such force that her head penetrated the wall. At some point in the evening, Wade wrapped a dog leash around the child's neck and attempted to hang her on the wall from a nail. He kicked the child and stomped her stomach. This beating lasted over 20 hours and the pathologist who performed the autopsy on Joyce opined that her injuries were very painful and it must have taken hours for her to die.

The intentional killing and the intentional infliction of extreme pain also meet the narrowing requirements already discussed. A sentencing judge or jury could reasonably find that "not all . . . [California] capital defendants" intentionally kill and inflict extreme pain upon their murder victims. Arave v. Creech, 123 L. Ed. 2d at 201, emphasis added. Some may not intend to kill or do so unintentionally, or they may inflict no pain upon the victim, or they may inflict something less than extreme pain. Thus, the statutory scheme in California has narrowed in a meaningful way the category of defendants upon whom capital punishment may be imposed.

The majority opinion to the contrary is erroneous and this petition should be granted to reverse it.

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II

PROPER BOYDE APPLICATION DICTATES WADE'S JURY UNDERSTOOD THAT INTENT TO TORTURE WAS AN ESSENTIAL ELEMENT OF THE TORTURE-MURDER SPECIAL CIRCUMSTANCE, BECAUSE IT HAD BEEN INSTRUCTED OF SUCH INTENT IN THE ACCOMPANYING TORTURE-MURDER INSTRUCTION

Irrespective of the torture-murder special circumstance instruction's silence regarding intent, one member of the Ninth Circuit panel, as well as the California Supreme Court and the district court judge, all found that Wade's jury understood that intent to torture was an essential element of the torture-murder special circumstance from the other instructions given at trial. Because a proper application of Boyde's "reasonable likelihood" test dictates this result, this Court should grant certiorari to explain Boyde's application and limits. The majority improperly limited the Boyde

test to instructions that are ambiguous on their face when viewed in isolation.

Concerned that the statutory language of the torture-murder special circumstance, if read in isolation, might raise a vagueness issue under the narrowing requirement of the Eighth Amendment, the California Supreme Court relied on the established legal definition of torture and held that the language of the special circumstance did include an intent requirement. People v. Davenport, 43 Cal. 3d 247, 271, 221 Cal. Rptr. 794, 710 P.2d 861 (1985). On appeal, Wade urged reversal of his special circumstance based on the Davenport holding. However, the California Supreme Court found that under all of the instructions given, Wade's jury understood the intentional nature of torture in the special circumstance.

Wade's jury was instructed that in order to find a special circumstance of torture-murder the murder must be intentional and it must involve the infliction of torture. "To prove the infliction of torture, the infliction of extreme physical pain must be proved no matter how long its duration." RT 6107; Cal. Pen. Code, § 190.2, subd. (a)(18). It was also instructed on first degree murder. In the course of defining first degree murder the trial court told Wade's jury that in murder perpetrated by torture; "[a] necessary mental state in murder by torture is the specific intent to cause cruel pain and suffering for the purpose of revenge, extortion, persuasion or for any sadistic purpose." RT 6101, emphasis added.

The prosecution's argument described the brutal and prolonged beating of the child as both torture and intent to

kill. RT 6150-6172. At one point, he indicated ". . . the beating went on, the torture went on, until the very life was taken from that child." He argued the child's pleading for her life were heard by Wade and ". . . tend to show that he had in his heart and mind the intention to kill that young child." RT 6160.

The California Supreme Court concluded that although the special circumstance instruction, "viewed in isolation, did not, by its express terms, explain that the `infliction of torture' element of the special circumstance included an intend-to-inflict-cruel pain requirement, we believe that in light of the accompanying torture-murder instructions and the argument of counsel on this point there is no reasonable likelihood that the jury was misled on this issue." People v. Wade, 44 Cal.3d 366, 994 750 P.2d 794, 244 Cal.Rptr. 905

(1988), cert den. 488 U.S. 900, (1988). It went on to state that although in some cases there could be reasonable doubt that the jury understood that the infliction of torture element in the torture-murder special circumstance embodied the same intent-to-cause-cruel-pain element as in torture-murder, "nothing in the present record suggests the jury in this case was likely to have drawn any such distinction in the use of the term 'torture' in the two instructions. Indeed, the prosecutor in closing arguments specifically explained to the jury that the torture-murder special circumstance required essentially the same showing as torture-murder itself, plus the single additional element of an intent to kill." Wade, 44 Cal.3d at 994, emphasis in original.

The district court agreed there was no constitutional infirmity in the torture-murder special circumstance

instruction on the basis that there was no reasonable likelihood that the jury was misled on the issue. Wade v. Vasquez, 752 F.Supp. 931, 936 (C.D. Cal. 1990). The dissenting judge of the Ninth Circuit panel also agreed. Wade v. Calderon, 29 F.3d at 1337-1338. He went on to state that it was indeed most unlikely "that a rational jury could believe it had to find intent to torture for first-degree murder, but that somehow the intent element dropped out when the issue escalated into whether a special circumstance warranting the death penalty existed. This assessment seems especially true given the ordinary meaning of the word 'torture' which unmistakably embodies the idea that the act is done with intent." Id., at 1338.

The majority found fault with the California Supreme Court's determination that Wade's jury had been

adequately instructed because there was no "reasonable likelihood" that the jury was misled by the faulty instruction. It did so by limiting the Boyde test to "ambiguous" jury instructions without regard to the other instructions in the case. Boyde v. California, 494 U.S. 370, 380 (1990); Wade v. Calderon, 29 F.3d at 132-1321. It declared the instruction at issue in this case "was not ambiguous" and declared Boyde "does not sanction use of the `reasonable likelihood' standard when the disputed instruction is erroneous on its face." Id., at 1321. However, the special circumstance instruction does not say that intent is not required. That would make the instruction "erroneous" on its face. An instruction silent on intent to torture is ambiguous, not "erroneous" for purposes of applying Boyde.[6]

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6. It was erroneous under state law (Davenport, 43 Cal. 3d at 271), but the question is not what the state court

The majority's cavalier application of Boyde ignores the fact that the penalty instruction's silence on the intent element is a latent ambiguity which must be compared under Boyde with the instruction on torture-murder. The majority's declaration that the instruction is not ambiguous is simply wrong. The majority improperly limited Boyde's application.

Finally, the majority observes that Wade's jury was instructed on first degree premeditated murder as well as first degree torture-murder. Id., at 1322. It concludes that ". . . it cannot be said that, in convicting Wade, the jury necessarily found that he had intended to torture the victim." This is a red

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would say is a proper jury instruction. The key is how a jury would have reasonably understood it. California v. Brown, 479 U.S. 538, 541 (1987) citing Francis v. Franklin, 471 U.S. 307, 315-316 (1985).

herring betraying the result orientation of the majority. The point is, the two torture instructions gave the jury a complete definition of torture-murder which included intent. Under these circumstances, the jury must have used the same definition of torture for the special circumstance instruction. As the California Supreme Court, district court and dissenting opinion found, there was no reasonable likelihood that the jury was misled by the special circumstance instruction in this case.

The majority limited Boyde to patent ambiguity, and viewed the challenged instruction in isolation from other instructions. Why would the jury apply two different definitions of torture when it was not told to? An "erroneous" instruction would have said that in the special circumstance, unlike the torture-murder instruction, torture does not

contain an intent element. The nature of the ambiguity in this case comes from (1) the silence of the special circumstance instruction on the issue of intent; (2) the common notion of torture, which includes intent; and (3) the torture-murder instruction, which explicitly included the intent requirement. Thus, the majority is relying on an illusory distinction to limit Boyde. Its interpretation is in conflict with that of the California Supreme Court, the district court and the dissenting Ninth Circuit judge, and should be rejected. There is no reasonable likelihood that the jury as a whole determined that the special circumstance of torture required no intent. The majority has embraced a remote, speculative possibility, to reject the application of Boyde by the California Supreme Court, district court and dissent.

This conflicts with the California Supreme Court's interpretation and application of Boyde and four federal circuits. United States v. West, 28 F.3d 748, 750-752 (8th Cir. 1994); United States v. Merlos, 984 F.2d 1239, 1241-1242 (D.C.Cir. 1993); Rock v. Zimmerman, 959 F.2d 1237, 1247-1248 (3rd Cir. 1992); Williams v. Chrans, 945 F.2d 926, 937-938 (7th Cir. 1991); Taylor v. Gilmore, 954 F.2d 441-452, 453 (7th Cir. 1992); Parks v. Saffle, 925 F.2d 366, 369 (10th Cir. 1991).

III

THE MAJORITY'S FINDING OF INCOMPETENT COUNSEL AT THE PENALTY PHASE RESTS ON HINDSIGHT ANALYSIS IN VIOLATION OF THE CAUTIONS IN STRICKLAND - FRETWELL, A CONCLUSION WHICH IS EMPHASIZED BY THE FACT THAT THE OPPOSITE RESULT WAS REACHED BY THE CALIFORNIA SUPREME COURT AND THE DISTRICT COURT JUDGE

Ineffective assistance of trial counsel is uniformly raised as an issue in all death penalty cases in California.

Hindsight and second-guessing the actions of defense counsel on this issue, therefore, threatens every death judgment and must not be sanctioned.

The district court judge who conducted an evidentiary hearing on effectiveness of trial counsel and observed his demeanor during testimony, found that Wade was not denied effective representation. Wade v. Vasquez, 752 F.Supp. at 932-934. Specifically, he found "[t]he California Supreme Court correctly decided that Ames was reasonable in begging for sympathy for his client. It was all he had." Id., at 934 regarding penalty phase representation. One member of the Ninth Circuit panel, Judge Trott, agreed. Despite the deference due the district court's fact finding in support of the denial of habeas corpus (Rules of Civ, Proc., Rule 52(a); Amadeo v. Zant, 486 U.S. 214, 223 (1988) even though the

petition is reviwed de novo (Bianchi v. Blodgett, 925 F.2d 305 (9th Cir. 1991)), the majority reversed the penalty by second-guessing three of trial counsel's tactics in a classic application of hindsight.

The Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. Lockhart v. Fretwell, 506 U.S. ___, 122 L. Ed. 2d 180, 188, 113 S. Ct. 838 (1993), citing Strickland v. Washington, 466 U.S. 668, 684 (1984). The challenged conduct must bear on the reliability of the trial process, not merely determine the outcome. Id., at 189.

Strickland emphasized that "judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is

all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689.

This admonition was recently repeated when this Court observed,

> "[I]neffective assistance of counsel claims will be raised only in those cases where a defendant has been found guilty of the offense charged, and from the perspective of hindsight there is a natural tendency to speculate as to whether a different trial strategy might have been more successful. . . . 'prejudice' component of the Strickland test . . . focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. [Citations omitted.] Unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." Lockhart v. Fretwell, 122 L. Ed. 2d at 190-191, emphasis added.

Ignoring these principles and disagreeing with the competency finding of the California Supreme Court, the district court judge who conducted a hearing on the matter and one member of the Ninth Circuit panel, the majority concluded that counsel for Wade fell below the Strickland standard of effective representation at the penalty phase. The majority cites three tactical defects in second-guessing trial counsel and the other judges who considered the matter. Specifically, at penalty phase the majority found "seriously deficient" performance due to counsel's (1) failing to present any significant evidence of Wade's abuse as a child at the penalty phase; (2) calling Wade to the stand and summoning "Othello," whose "testimony can only have been damaging to Wade"; and (3) arguing to the jury that "executing Wade would be a favorable outcome to Wade." As the

dissent points out, each of these findings is based on a hindsight inspection of the cold record and ignores defense counsel's tactical decisions. Wade v. Calderon, 29 F.3d, dissent at 1338-1349.

Trial counsel decided to present mitigating child abuse evidence during the guilt-special circumstance phase of the trial. He did that through medical experts who testified that Wade disassociated himself from the sexual and physical abuse he suffered as a child which led to development of multiple personalities. The child abuse evidence included a four-hour taped interview of Wade by a psychiatrist. During the penalty phase, Wade testified he had told the doctors the truth about his childhood when a person by the name of Jack abused him sexually and physically. RT 6307. The lengthy testimony of child abuse offered during the guilt phase (through

the doctors and a videotaped interview of Wade conducted by Dr. Allison and his attorney) had dramatically evidenced the child abuse to the jurors without giving the prosecution a chance for effective cross-examination. The jury was expressly instructed in determining the penalty to consider all the evidence which had been received during any part of the trial of the case. RT 6449-6450. Wade v. Calderon, 29 F.3d dissent at 1338-1339.

At the evidentiary hearing, counsel had explained his tactic in putting the mitigating evidence before the jury as early as possible, saying,

> "I wanted them to know that Melvin Wade was a human being, that he was a sick human being, and I didn't want to wait until the end of the case to present that, so that the jury would cement and harden their position very early as they heard Mr. Christy [the prosecutor] put on all of the evidence in this case.
>
> "Furthermore, the child abuse gave rise to the multiple personality, therefore counsel

> presented the abused childhood to the jury within the concept of the dissociative disorder, not as a separate defense apart from that." Wade v. Calderon, 29 F.3d dissent at 1339-1340.

Indeed, the tactic of presenting the favorable mental state defense to the jury without cross-examination is highly skillful and professional. So much so that the trial judge was concerned in ruling the videotaped testimony admissible that it might be a "very, very clever tactic" that was not fair to the prosecution. 5/23/90 EH at 115-117, dissent at 1340-1341. Consequently, the majority's hindsight is wrong. Trial counsel's strategy was not only reasonable, it was outstanding.

The majority next faults counsel for having "Othello" testify. That testimony at penalty phase was an attempt to prove the existence of an extreme mental disorder which would justify life instead of death. The dissent correctly

notes that counsel's decision to prove Wade's mental disorder by demonstrating it first hand to the jury was a sound trial tactic. "In fact, the worse the disorder, the more weight it probably could have as a mitigating circumstance." Wade v. Calderon, 29 F.3d at 1342. A trial counsel should not be limited to the technical testimony of doctors but should have the option to "make it real, make it live, give it emotional impact." Id., at 1343. In short, a lawyer should not be labeled unprofessional for proving directly that which the law permits him to evidence to mitigate the conduct and to moderate the sentence.

Finally, the majority concludes that Wade's attorney "gave up" and essentially asked for his own client's execution. As the dissent points out, this statement ". . . misreads and thoroughly misrepresents counsel's

argument." Wade v. Calderon, 29 F.3d at 1344. In context, counsel's theme was that the alternate personality killed Joyce and his argument was a reasonable and tactical one aimed at gaining the jury's sympathy for the defendant just as the Supreme Court of California had concluded, and was not tantamount to advocating his client's death. Wade v. Calderon, 29 F.3d dissent at 1344-1347, People v. Wade, 44 Cal. 3d at 998. That is certainly how the prosecutor viewed the theme of the defense. During his closing argument, the deputy district attorney observed that the defendant would lie about his mental condition and ability to reason "as long as he believes there is one person who will believe him. . . . but perhaps there is some real problem there that he has. It's intended to get your sympathy and your feelings." RT 6459, emphasis added.

In his argument, defense counsel responded "I just want to conclude with, considering the disorder, the emotional disturbance that the evidence has suggested to you by way of the physicians in this case and the psychologist, I don't think that Melvin Wade, Melvin Meffery Wade, can actually, can be said to lose this case." RT 6472. Then he added that Wade himself had expressed on many occasions that he could not live with the beast from within him "any longer and if in your wisdom you think the appropriate punishment is death, you may be also giving an escape . . . [to him]." RT 6492.

The majority characterized defense counsel's closing argument as Caldwell error which diminished the jury's feeling of responsibility for determining the penalty. Wade v. Calderon, 29 F.3d at 1324. In fact, counsel's argument was a

challenge to the jury to return a life without parole verdict. Specifically, the argument told them executing Wade whose body killed the child would not execute "Othello" who actually did the killing. In other words, counsel challenged the jury to kill Wade only if he were not ill. The argument emphasized the jury's natural reluctance to execute the innocent body of Wade rather than the guilty mental element of "Othello." Caldwell has no application to this situation. The argument did not affect the jury's role in the sentencing process.

In Caldwell the prosecutor misstated the applicable standard by telling the jury someone else would ultimately make the decision as to whether a defendant lives or dies. Caldwell v. Mississippi, 472 U.S. 320, 332-333 (1985). Here counsel's argument was based on what constitutes evidence of mitigation and

aggravation. While such an argument has the risk of backfiring, it is a tactical decision which does not reduce the jury's responsibility for its decision. The majority is simply wrong in its analysis. See Romano, 129 L. E.d 2d at 10-11, that accurate evidence of a prior death sentence does not reduce jury's responsibility.

Implications of Hindsight Review

Looking at the record as a whole, Wade's first attorney left the case after the preliminary hearing stating it was "an absolute loser, and the facts were heinous and . . . he couldn't imagine any jury that wouldn't convict him." 5/22/90 EH at 35. Nevertheless, Wade's new attorney hired a battery of experienced investigators and experts. None of them could find evidence of a mental defense before Wade's trial. Wade's counsel did the best he could with what little he had.

Wade v. Calderon, 29 F.3d (Trott, J., dissenting) at 1347. In the context of a hopeless case, even greater deference is due to the tactical decisions of counsel.

The district court judge who conducted an evidentiary hearing on the competence of counsel concluded counsel provided constitutionally adequate representation. Wade v. Vasquez, 752 F.Supp. at 932-935. He concluded,

> "To attempt to justify the facts of the murder Ames decided to continue his `Melvin didn't do it' defense of dissociative disorder. If it could raise a `maybe?' in the minds of the jurors his tactic might succeed. He didn't and it didn't. He cannot be faulted for the jury's rejection of his argument since the murder could not be described in any other way than atrocious and the evidence was overwhelming of the violence with which the murder had been committed." Id., at 934.

The California Supreme Court likewise concluded the penalty phase argument reflected no incompetence, but attempted to gain the jury's sympathy for the

defendant. People v. Wade, 44 Cal. 3d at 997-998. Finally, the dissent examined each of the allegations and found counsel's performance adequate and his tactics the mark of experience. Wade v. Calderon, 29 F.3d at 1338-1349. Indeed, the tactic of presenting a defense through experts and a videotape without cross-examination was seen as "highly skillful and professional. This tactic is the mark of experience and know-how, not incompetence . . ." Id., at 1340.

Finally, a particularly worrisome aspect of this case is the fact that any attorney in any case can be second-guessed and trial counsel for convicted capital defendants automatically find themselves assailed for alleged deficiencies in every case. Wade v. Calderon, 29 F.3d part III at 1348-1349. The majority has second-guessed -- and wrongly at that -- experienced trial

counsel faced with an impossible case and difficult tactical choices. A two-judge majority of a federal circuit court of appeal on review of a denial of petition for habeas corpus should not second-guess trial counsel and every judge who has heard the case over a twelve year period -- to reverse a death sentence.

CONCLUSION

The petition must be granted to clarify and enforce this Court's prior decisions in Boyde, Caldwell and Strickland.

For the reasons stated herein, Petitioners respectfully urge this Court to grant certiorari in this matter.

Respectfully submitted,

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v.

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Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92186-5266.

I have served the within PETITION FOR WRIT OF CERTIORARI FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT NAD ASPPENDICIES as follows: To William K. Suter, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and forty (40) copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing one copy in a separate envelope addressed for and to each addressee named as follows:

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Each envelope was then sealed and with the postage prepaid deposited in the United States mail by me at San Diego, California, on the 24th day of October 1994.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, October 24, 1994.

Anne Marie Buford

ANNE MARIE BUFORD

Subscribed and sworn to before me
this 24th day of October 1994.

Jean M. Burns

Notary Public in and for said County and State

JEAN M. BURNS
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My Commission Expires Sept. 17 1995